

1 THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF SOUTH CAROLINA  
3 CHARLESTON DIVISION

4 IN RE: :  
5 M.I. WINDOWS AND DOORS, INC. :  
6 PRODUCTS LIABILITY LITIGATION : 2:12 MN 1

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10 Status Conference held Wednesday, September 19, 2012,  
11 commencing at 1:36 p.m., before the Hon. David C. Norton,  
12 in Courtroom II, United States Courthouse, 81 Meeting St.,  
13 Charleston, South Carolina, 29401.  
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25 843/723-2208

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1 THE COURT: I've got CMO-3; I appreciate y'all  
2 agreeing on that one, so we'll enter that order. We'll enter  
3 CMO-3. Okay? Any objection to that?

4 MR. BRYSON: No, Your Honor. That's all I had.

5 MR. FARRIER: Your Honor, this is Tom Smith, a  
6 partner of mine out of Pennsylvania, who I don't know if --

7 MR. SMITH: No, Your Honor, we negotiated long and  
8 hard with plaintiffs on CMO-3, and happy to say that just  
9 about an hour ago we finished it up. So we're happy to be  
10 able to present it.

11 THE COURT: Great. So we'll enter that, all right?

12 MR. BRYSON: Your Honor, Dan Bryson for the  
13 plaintiffs, and Justin Lucey. We would suggest that we go to  
14 CMO-2. And over the last couple of hours we've made  
15 significant progress on ironing out some of our differences on  
16 that, and if we could approach the bench and give you an  
17 additional color-coded copy of that.

18 THE COURT: Thanks for the color-coded copy, it does  
19 make it a lot easier for us to figure out where the  
20 competing -- But next time, after having read it  
21 electronically yesterday and earlier this morning, I finally  
22 got around to reading the footnote, so next time make a big  
23 red arrow to say the footnotes are important this time, all  
24 right? But I got them.

25 MR. BRYSON: Your Honor, going into CMO-2, with

1 regard to really trying to set forth a lot of procedures with  
2 regard to obviously discovery, how we're going to proceed with  
3 discovery, we have eliminated the fact sheet profile sheet  
4 section. We thought that would be helpful, but there was  
5 objection to that, so we took that out. That was probably the  
6 most significant change from the version that you have. So  
7 really just going to the colored portion, yellow, again, are  
8 suggestions that we think should be in there; blue for MI;  
9 green, it's a contractor section that Mr. Hahn can address.  
10 And it is color coded, that means one or two of the parties  
11 disagree to that particular language. The red language that  
12 you have in front of you now indicates those areas where we  
13 have reached a tentative agreement.

14 I might add that -- so the first fundamental issue that we  
15 have, Your Honor, is how to proceed with discovery. And  
16 really going to Section D, master written discovery by  
17 homeowner and contractor plaintiffs. You know, it is our  
18 position that we would, as a homeowner group representing  
19 homeowners in multiple states, would have specific discovery  
20 that we would like to provide to the defendant MI.

21 Indeed, we've agreed to give them a master set of our  
22 discovery by next Friday, and to move that process along. A  
23 lot of that discovery, quite candidly, will mirror a lot of  
24 discovery that was already served in the underlying case, but  
25 we're refining it. But to large extent it will be discovery

1 that's already been sent, seen and provided to MI and  
2 addressed. But that's neither here nor there. We will have  
3 that by next Friday.

4 THE COURT: Does that mean the day after tomorrow or  
5 a week from day after tomorrow?

6 MR. BRYSON: I think a week from day after tomorrow.

7 The issue -- there is some issue with regard to how many  
8 document requests can we have, including subparts. But  
9 fundamentally, Your Honor, there is a problem with do we get  
10 to have a set of discovery, the contractor get to have a set  
11 of discovery, and then MI has to answer both sets of  
12 discovery. We certainly, again, want to have our own  
13 particular set of discovery, and think that the contractors  
14 may have their own set of discovery. After they see ours,  
15 we'll have ours within ten days, and they can decide if that's  
16 duplicative of what they were thinking, or if they have some  
17 additional questions.

18 Certainly any documents that are produced, information  
19 that's produced, answers that are produced, they would have  
20 access to that information. But that's a fundamental problem  
21 that the parties have now, that we've not been able to  
22 overcome that hurdle, is MI, and they can certainly state  
23 their own position on it, thinks it ought to be just one set  
24 of discovery from both parties; we think it should be two sets  
25 of discovery, and feel pretty strongly about that. And that

1 really is the issue.

2 Does Your Honor want to have them address each position as  
3 we move along, and those --

4 THE COURT: Probably easier to get it. What about  
5 the contractors, Mr. Hahn?

6 MR. HAHN: Thank you, Judge. If I may, the issue  
7 that Mr. Bryson's touched on flows through this entire  
8 document. And that issue is, at the last status conference  
9 Mr. Lucey said that he believed that 89 percent of the  
10 discovery was done and he just needed a little bit and was  
11 ready to go. I understand that position that he has. That  
12 creates a conflict with this MDL moving forward.

13 THE COURT: I think the basic question is, do you  
14 agree with Mr. Bryson that you want your own separate set of  
15 discovery?

16 MR. HAHN: No, sir, Your Honor. What I think we  
17 ought to have is what the MDL process calls for and the manual  
18 calls for is we have joint discovery. However, I understand  
19 their concern. And they don't want to sit and wait, they  
20 don't want to share what they've already got in the bag with  
21 us, and they don't want to sit around waiting for us to catch  
22 up before the case moves forward, which creates the conflict.  
23 And I, quite frankly, don't know how to deal with it. And it  
24 flows not only with requests to produce, it will be  
25 interrogatories, it will be depositions, and all the way

1 through this process. And I apologize to the Court for even  
2 putting this forward, but I am at a loss, Judge.

3 MR. FARRIER: Your Honor, and this is -- I do agree  
4 that this is -- we have a fundamental issue which transcends  
5 everything that we're here to discuss today. It's our  
6 position and the position of the Manual on Complex Litigation,  
7 that the MDL process should be a coordinated process. And  
8 it's been difficult for to us have discussions about where  
9 we're going with some of this, because we can't get everyone  
10 under the same tent in that regard.

11 You know, we would prefer, and I think the rules and the  
12 philosophy of an MDL anticipate that there would be  
13 efficiencies brought to the process as a result of the MDL,  
14 that for whatever discovery tool is being used, there would be  
15 some coordination on this side, on this side of the table, as  
16 the two PSCs seek to build their own cases, they're  
17 coordinating what they're doing, and we're responding to a  
18 consolidated managed set of discovery. And we're not there at  
19 present. And as has just been stated, I'm not sure where to  
20 go with that. I don't know whether a mediation of sorts is in  
21 order.

22 MR. BRYSON: Your Honor, if I might add, and just a  
23 few more comments. Mr. Hahn's comments are much more  
24 overarching than the issue I was addressing with regard to  
25 discovery. We have agreement, for example, with MI and with

1 Mr. Hahn's agreement on the number, that there will be, I  
2 don't know, 25 depositions taken of certain number of  
3 witnesses. You know, certain that the duration of those  
4 depositions, we've negotiated that on how long they would be.  
5 Absolutely and certainly, before those depositions of an MI  
6 representative, we will meet with Mr. Hahn and agree to who  
7 goes first, how much time do you guys need, how much time do  
8 we need, do you want to go first on this one, we'll go first  
9 on the next one, they've produced all these documents, let's  
10 look at the documents and let's make a decision on this  
11 particular witness. We have no problem, and we're stating  
12 that for the record that we agree that coordination's  
13 necessary. But we're talking about with regard to a discovery  
14 request that we have. We have a specific set of homeowner-  
15 related discovery that we want to ask, as Your Honor has heard  
16 through two days of hearings, and again, based on how Your  
17 Honor rules, there's a number of questions and things we have  
18 to explore and answer to prove the various legal causes of  
19 actions that we have. And then I guess going into the more  
20 fundamental issue that will come up in just a few minutes,  
21 perhaps, is when these documents are produced, and they'll  
22 produce them into a CD, we want to code these documents  
23 ourselves in a proprietary way among the homeowner plaintiff  
24 group. Because we have a number of issues that we've learned  
25 from experience that manufacturers don't think there's a

1 problem with their product, and they look to blame it on  
2 contractors for installation, they blame it on homeowners for  
3 maintenance, you know, they have a number of defenses that  
4 manufacturers assert. We would be having, as we go through  
5 documents, we will be coding them. And even now I feel like  
6 I'm revealing kind of some of our work product, but I think  
7 that it's necessary that we have things that we're looking at,  
8 that we code the documents that we think that we have a right  
9 to keep that type information confidential.

10 Because even one day down the line, there's a resolution  
11 of this case, there could be contractor claims, you know, we  
12 heard that come up from Mr. Perrone when he argued, you know,  
13 you guys just need to be going and filing a lawsuit against  
14 the builder.

15 Who knows what we may do one day, except that with regard  
16 to the documents that are produced to us, these would be  
17 documents that could be shared by them. Nobody is saying keep  
18 the documents to themselves. It's just with regard to our  
19 coding of our documents that we would want to do that and keep  
20 that proprietary to ourselves. But we have no problem sharing  
21 the information that's produced by MI with Mr. Hahn, and then  
22 coordinating discovery.

23 So I don't really see where the problem is. We have right  
24 now ten different pending lawsuits that we're having to do  
25 discovery on. And we're just asking, you know, that we be

1 able to submit a set of master discovery for all ten of those  
2 states, and that we do that in a manner that we would produce  
3 by -- we would have ready by next Friday.

4 THE COURT: All right.

5 MR. HAHN: Your Honor, if he's going to make a  
6 representation on the record, we're relying on that, and we'll  
7 deal with other issues as they come up.

8 THE COURT: So you don't have any problem with the  
9 homeowners committee keeping proprietary their coding of the  
10 documents with regard to their claims?

11 MR. HAHN: No, sir, we talked about that. That a  
12 larger issue with that is, which we'll just have to work  
13 through, is they want their own depository of the database.  
14 And so we'll have two databases. And there will be some, I  
15 expect, problems, because of technology, that one database  
16 didn't want the documents, the other one does. Through  
17 nobody's fault, it's just going to happen, and we'll have to  
18 deal with how to handle that.

19 THE COURT: But you're not saying that Document A is  
20 going to be Document A in your database and Document A in your  
21 database and Document A in your database; you're not putting  
22 different numbers on them, are you?

23 MR. HAHN: I would hope not, Your Honor.

24 THE COURT: I would hope not, too, because if you do,  
25 I'll shoot every one of you.

1 MR. HAHN: Yes, sir.

2 THE COURT: So, yes, sir.

3 MR. FARRIER: Your Honor, this is really a  
4 significant concern of ours. The argument for the JPML was  
5 that we want to have consolidated process for discovery. It  
6 creates an incredible mine field for us to have to segregate  
7 what we're doing in terms of discovery. Whatever database is  
8 produced in response to a master set of discovery, needs to be  
9 a single database. What happens in terms of splitting that up  
10 after it's produced, we don't really care. But the production  
11 has got to be the same. The attorney-client privilege  
12 analysis as to specific documents has to be the same and  
13 consistent, so that there are common rulings. Otherwise,  
14 we've got a bifurcated MDL.

15 MR. BRYSON: You know, I don't get it. Aren't they  
16 going to -- they're going to produce documents, and any  
17 documents you produce pursuant to our discovery requests, Mr.  
18 Hahn gets a copy of it. You produce them -- I think you have  
19 the opportunity on DVDs or CDs, however you want to produce  
20 them, you make a single Bates stamp on your documents when you  
21 produce them. We give a copy to him so he can code them the  
22 way he wants, we have them, we code them the way we want on  
23 the issues we think are important, and we're all on the same  
24 page.

25 And if you produce documents that are specifically

1 responsive to his discovery requests, we get a copy of them,  
2 we have them. We're all -- you're not having to do things --  
3 I don't understand any duplicate fashion.

4 MR. FARRIER: I don't know how to say this other than  
5 to do it sort of visually. As long as we are producing one  
6 time sort of on that side of the room, what happens after it  
7 goes on that side of the room, we don't care about.

8 There's a technical issue about whether or not there's a  
9 common database to start out with, and whether that's  
10 segregated or not. But it creates difficulty if no one knows  
11 which document is being -- has actually been produced. As  
12 long as we all, including the Court, can, with confidence, say  
13 yes, this document was produced, or this privilege was claimed  
14 on this specific day on this specific basis, then that's a  
15 system we can work with.

16 THE COURT: Okay. So you and your documents, you're  
17 going to Bates stamp, I guess, each of your documents, right?

18 MR. FARRIER: Yes.

19 THE COURT: And those Bates stamped defendants'  
20 documents are going to be produced to whatever, to a master  
21 place. Everybody is going to have the same documents that you  
22 produce, then you're going to access them and use your coding,  
23 and you're going to access them and use your coding.

24 MR. FARRIER: Correct.

25 MR. HAHN: I'm sorry, Judge, they're talking about

1 two separate databases. Complete. So --

2 THE COURT: Who's talking about two separate  
3 databases?

4 MR. HAHN: The homeowners. I thought we'd have one  
5 database, and I'd access them separately, us my coding, they'd  
6 access them separately using their coding. That's not what  
7 they're interested in. They want two separate databases.

8 MR. BRYSON: I think that's another issue, Judge.  
9 We're talking about the documents would be produced. We have  
10 a hard drive that the documents were loaded into with a  
11 program, a proprietary program, I think we're going to use  
12 Concordance, that we code and use our issues and we'll go at  
13 it.

14 The storage mechanism for it is not, you know, that's not  
15 very expensive. They would get the documents. As I  
16 understand it, Mr. Hahn is going to use a company called ILS.  
17 And quite candidly, we talked to ILS, they're a lot more  
18 expensive than what we were willing to spend the money on.  
19 But we have a law firm that's involved as part of our PSC,  
20 they have access to the proprietary Concordance database,  
21 which is well known and well used, and that's what we wanted  
22 to use.

23 So the software to code is what's different, and they have  
24 it, the documentation, there will be a consistency of the  
25 documents that are produced and they're not going to get

1 conflicting Bates numbers or anything of that nature.

2 THE COURT: Well, let's start step one. Mr. Farrier  
3 is worried about having to produce -- all he wants to do is  
4 produce them one time to wherever it's going to go. Right?  
5 Do you have any problem with that?

6 MR. BRYSON: Do not. They're producing it on a DVD.

7 THE COURT: Do you have any problem with that? All  
8 he's doing is producing it one time.

9 MR. HAHN: No, sir.

10 THE COURT: Okay.

11 MR. FARRIER: There was a little bit of a caveat  
12 there. Assuming a single document depository. And the way I  
13 would look at it visually is as we produce, we're going to put  
14 it in the barn. Those guys can work out access to the barn,  
15 what they can take out of the barn, who sees what is being  
16 taken out. So that if there's a question later on in a  
17 deposition, as a practical matter, somebody says, I've never  
18 seen this document before, we can go to the barn and prove  
19 that it's there.

20 MR. BRYSON: There's been some negotiations that are  
21 actually in the ESI order that may contravene a bit what I  
22 just said; Mr. Lucey wants to address that.

23 THE COURT: Okay.

24 MR. HAHN: If I may, Judge, one way that might deal  
25 with this is ILS is a third-party vendor. If the defendants

1 dump all the documents into ILS' database, then the homeowners  
2 can go, can be notified, we just got a dump, they can go to  
3 that database and get them. And everything is out of that  
4 database they get it. Then they can put it on Concordance or  
5 whatever they want to do with it, and it's there. And we can  
6 deal with the cost of -- that little bit of storage is  
7 minimal, and they can deal with that cost between the parties.

8 MR. LUCEY: Your Honor, the issue of databases is  
9 downstream really from the issue that the defendant is  
10 addressing and that I believe the Court needs to deal with.

11 The defendant is going to produce its data on ten DVDs or  
12 one hard drive. There will be a duplicate copy of that hard  
13 drive. Mr. Hahn can have a copy of the hard drive, we'll have  
14 a copy of the hard drive. At that point each party has  
15 exactly what Mr. Farrier produced. Each party is entitled to  
16 load that into the fanciest or simplest database they want,  
17 code it or whatever else. There's been an identical  
18 production, it is already coded by MI, there's no room for  
19 dispute. Any firm I know takes a snapshot of that hard drive  
20 the moment it comes, so everybody always knows what's on that  
21 hard drive. And it actually gets more technical than that.

22 But for simplicity purposes, they're not putting it in a  
23 barn, so to speak. They're going to put it on a hard drive,  
24 there will be two identical hard drives. I'll be happy to  
25 personally pay for the second hard drive. And each group of

1 defendants will have the identical production.

2 THE COURT: All Mr. Farrier cares is he just has one  
3 document dump, whether you dump it on a hard drive or a  
4 warehouse. That solves your problem, right?

5 MR. FARRIER: It does, Your Honor.

6 THE COURT: Now, what problem does that create for  
7 y'all?

8 MR. HAHN: If he dumps it one time, we have to saw it  
9 in half. That's all.

10 THE COURT: No, you don't have to saw it in half, you  
11 have to duplicate it. Electronically that's --

12 MR. HAHN: As long as we have the exact duplicate, I  
13 guess we'll move forward with that. I envision down the road  
14 that might produce some tension, but we'll just have to deal  
15 with that, and I'm happy to deal with it.

16 THE COURT: Produce some tension how?

17 MR. HAHN: Because technologically it's never that  
18 simple, when you're dealing with hundreds of thousands of  
19 pieces of paper.

20 THE COURT: Well, that's something that certainly  
21 isn't defendant's fault or the plaintiffs' fault, that's  
22 technology's fault.

23 MR. HAHN: That's technology's fault and that's just  
24 something we'll have to understand and deal with as we move  
25 forward in the litigation.

1 THE COURT: So where is Mr. Farrier going to put his  
2 documents, in what warehouse, where is that going?

3 MS. OLIVER: Judge, if I may, Alyson Oliver on behalf  
4 of plaintiffs. We've already worked out CMO-3, which this is  
5 contained within. Everybody agreed to it.

6 THE COURT: Okay.

7 MS. OLIVER: Documents are going to be put on a hard  
8 drive, they get to choose what sort of hard drive they want to  
9 use, they can use DVDs, they can use whatever they want to  
10 use. They give it to us, we copy it, and we have two copies.  
11 So it's already been resolved.

12 THE COURT: So you're okay with that? You're okay  
13 with that procedure?

14 MR. SMITH: Yes, Judge, Alyson is right. And then  
15 once we give a set of the documents, then they can decide if  
16 they want to load them into databases, if they want to load  
17 them into two separate databases or what they want to do. But  
18 we'll produce the documents, they'll be Bates numbered,  
19 they'll have the same Bates numbers on the documents go to  
20 both plaintiffs' parties, and work it out from there.

21 THE COURT: That's all everybody cares, we're all  
22 singing from the same hymnal, right?

23 MR. HAHN: Right.

24 MR. BRYSON: Certainly, Your Honor. And I'll put it  
25 on the record; I think to a large extent it behooves the

1 owners' group and the contractors' group to work together on  
2 reviewing documents and things of that nature, and we'll make  
3 efforts at that in the future.

4 Back to the fundamental issue though, that's raised on  
5 page two, Section D, master written discovery, what we propose  
6 is that -- and would like, is that each side have a set of  
7 discovery they can serve. We would serve our set of  
8 discovery, our master set of production, by next Friday. Not  
9 this Friday, but the next Friday. And then the contractors  
10 could look at it and decide what additional questions they  
11 think they need to prove their case on the types of documents  
12 they need on behalf of the contractors, and then would serve a  
13 request after that.

14 We have negotiated with MI, and we have agreed, we thought  
15 we really needed 50, but we've agreed with 35 original  
16 requests and 25 supplemental requests. And that's -- we agree  
17 to do that, assuming we can serve our own set of discovery.  
18 So the pink language that you see there is our agreement to  
19 tone down the number we originally wanted, if we can just  
20 serve -- get our discovery served.

21 MR. FARRIER: Your Honor, our interest is  
22 consistency, and one of the things we're trying to do with  
23 these CMOs is anticipate and resolve problems that we know are  
24 apparent right now. Our request is that we have a master set  
25 of discovery from the plaintiffs, regardless of which faction

1 gets which share of that, and that we respond to that. And  
2 that way we have overall consistency with all the privilege  
3 logs, with our responses.

4 You know, I don't know where the two PSCs are in terms of  
5 their ability to manage that, but we don't want to have to  
6 referee that from our standpoint. And I also think that at  
7 the end of the day there are common interests between the two  
8 PSCs that would be served by a common set of discovery. So  
9 the numbers, the number is fine. And we just ask that it be  
10 coordinated and consolidated by the two PSCs.

11 MR. HAHN: I just want clarification. I think  
12 Mr. Bryson said is the number 35 for him and 25 supplementals  
13 for them, so a total of 70 and 50.

14 MR. FARRIER: That's not what we agreed to. We  
15 agreed to a total of 35/25.

16 MR. BRYSON: I think that's -- this is the discovery  
17 for the ten states we have and the things that we feel like we  
18 have to prove, we need 35, which we don't think is burdensome,  
19 and we're prepared to propound that by next Friday.

20 THE COURT: So your take is 35 for the homeowners  
21 plaintiffs and 25 supplemental perhaps served a week from  
22 Friday. And then after Mr. Hahn takes a look at it, for him  
23 to serve whatever additional requests he wants with regard to  
24 the individual issues as to his clients. Is that --

25 MR. BRYSON: That's correct. And he's able to get

1 all the documents they produce, of course, to us, he would get  
2 as well. Then that gives -- that serves MI's purpose of not  
3 having Mr. Hahn maybe do the entire duplicate set, that his  
4 set would not -- he would not have to do that until after he  
5 looks at our set, which we think is reasonable.

6 MR. FARRIER: Your Honor, I thought we had a pretty  
7 clear agreement, contingent on coordination between the two on  
8 the numbers. We started out at 20, we went up to 25 total.  
9 I'm sorry, our agreement was for 35 total as between both  
10 PSCs. In a much more complicated case and a much larger  
11 entity in Bausch and Lomb, the Court limited it to 50.

12 One of the things the Court is to do in this process, I'd  
13 point the Court to 11.451 of the Manual, is to decide --  
14 excuse me -- but it is to manage the overall number, which, by  
15 the way, would be a starting point. If that is insufficient,  
16 then anyone can come to the Court and ask for additional. But  
17 35 and 25 should be sufficient.

18 THE COURT: Okay. Of course, having gone through  
19 Bausch and Lomb, it is not more complicated than this, it's  
20 much less complicated than this, okay? One defendant, you  
21 know.

22 MR. FARRIER: I think it's fair to say that one of  
23 the major distinctions is there is little comparison between  
24 the size and complexity of the defendant in that case versus  
25 this.

1 THE COURT: And so whenever lawyers say agreement, I  
2 mean, Mr. Hahn, did you agree with this or did you not agree  
3 with this; I don't know.

4 MR. HAHN: We met this morning, Judge. I raised this  
5 issue over how many do I get? And there was no clear answer  
6 to that, so I can't agree to it until I understand.

7 MR. FARRIER: Your Honor, the real problem here is  
8 the solution that's being proposed, and this is -- I am  
9 conflating these two positions -- is in order to avoid a  
10 consolidated discovery, both sides want to be able to do  
11 whatever they want. And I don't think that's a very fair and  
12 equitable solution as to the defendant.

13 The idea of the MDL, which we resisted, and was being  
14 sought by the plaintiffs, is to have a consolidated discovery  
15 process. And the fact that we're going to have enough, we're  
16 going to have enough of everything, depositions, requests for  
17 production, interrogatories for both sides to do anything they  
18 want to independently, I don't think is an effective solution.

19 MR. BRYSON: Your Honor, as a last comment, I don't  
20 want to do whatever we want on this, we're wanting to, again,  
21 based on the Court's rulings on motions to dismiss, we're  
22 willing to have discovery requests that would encompass what  
23 we need to prove, or each of the attorneys need to prove in  
24 their various states to establish their causes of action. And  
25 we want to have those requests. We think 35 is a reasonable

1 number. I provided those to Mr. Hahn. To the extent, you  
2 know, he may agree, he may have you not ask A, B, C, D, E, F  
3 and G, and then he'll add to it. My guess would be he won't  
4 have that many to add, but I don't know, he may. And then  
5 just serve them on MI.

6 THE COURT: Well, the question, my question is then,  
7 the quote unquote "agreement," the quote unquote "agreement"  
8 was that you get 35 supplementary requests on behalf of the  
9 homeowners, then Mr. Hahn gets some indefinite number of  
10 requests on behalf of his clients, and then Mr. Farrier's take  
11 on it is 35 total. So I mean, it doesn't seem to be an  
12 agreement to me.

13 MR. BRYSON: There's not. That's why I said we  
14 agreed to this number based on us being able to serve that  
15 number. And then there was no -- Right, there was no  
16 agreement. That number of 35 and 25 would be for plaintiffs,  
17 if we can serve discovery ourselves.

18 MS. LUMPKIN: Your Honor, if I may?

19 THE COURT: Yeah.

20 MS. LUMPKIN: Carol Lumpkin on behalf of MI. One of  
21 the things we're struggling with from the defense side is that  
22 when we were in front of the JPML, we suggested coordinated  
23 discovery amongst the plaintiffs. And that was absolutely  
24 objected to by the plaintiffs, they thought it would be  
25 insufficient, it would not be appropriate, so they insisted on

1 consolidation.

2 Now we're here, we're into our second MDL hearing, and  
3 frankly, the defendants find themselves in a very unusual  
4 position to be in between the two plaintiff groups with regard  
5 to the process.

6 Frankly, we have had many negotiations, and this has been  
7 ongoing since our hearing in front of Your Honor on July 12.  
8 But Mr. Hahn is correct about one thing. I mean, he's not  
9 participated in many of the attempts to try to move this case  
10 forward. I can't speak as to why, but the reality is, a  
11 perfect example is the number of depositions. We did agree,  
12 we tried to work and cooperate and come up with a number. But  
13 if that number is going to be selected only by the homeowner  
14 group, then of course the builder group is going to insist  
15 that they have their own number. Meanwhile, the defendants in  
16 the middle are going, you know, you can't disrupt an ongoing  
17 business this way. Pick what you want. And presumably the  
18 plaintiffs, and especially Mr. Lucey, who back in May was very  
19 adamant about how much information he already has with regard  
20 to this defendant, frankly, if they have that much  
21 information, and as he, you know, said on the record, he has  
22 90 percent of what he needs, he's really just looking for R&D;  
23 presumably they could provide one set of discovery amongst  
24 both plaintiff groups, that the defendant could start working  
25 on.

1 MR. BRYSON: Your Honor, I think we are as a group.  
2 And it's a little embarrassing, we just want to send some  
3 document requests and interrogatories to MI. And I guess Mr.  
4 Hahn does, too, on behalf of his clients. We think it's  
5 easier, they're a separate -- the contractor, the homeowner,  
6 the manufacturer. We send a set, they send a set, you know,  
7 we could send a set that says homeowners and contractor set of  
8 document requests, and he could delineate in that document  
9 which ones are his specific interrogatories and which ones are  
10 his specific document requests.

11 Everybody gets access to all the information. We're  
12 really, I guess, talking about a numbering issue; how many,  
13 more than anything. You know, quite candidly, we prepared,  
14 we're well along on preparing our master set of document  
15 requests and interrogatories, and that's why we want that  
16 number.

17 With regard to Miss Lumpkin's comments about what  
18 Mr. Lucey has, you know, I haven't seen it. I haven't looked  
19 at it. None of the other plaintiffs have looked at it,  
20 because we think there's a confidentiality order out there on  
21 that these guys have argued about. I haven't seen any of  
22 those documents. I hope the day comes when we can see those  
23 documents, but that's for another day, I guess, when things  
24 are produced.

25 THE COURT: Okay. And it may be in here and we

1 haven't gotten to it yet; do you contemplate sending Mr. Hahn  
2 discovery, and Mr. Hahn sending you discovery?

3 MR. BRYSON: That is not contemplated in this  
4 document, based on how the evidence developed, but he could.

5 THE COURT: I'm talking about in the philosophical  
6 sense, how about that?

7 MR. BRYSON: It could happen. If --

8 MR. LUCEY: It may, in part, turn on the motion for  
9 joinder tomorrow morning, and our position as parties in this  
10 case.

11 MR. HAHN: Judge, I can't imagine that that would  
12 happen. It would destroy all commonality issues that they  
13 have for their class. So --

14 THE COURT: Okay.

15 MR. HAHN: -- I see that as a very remote  
16 possibility. But we're happy to do whatever the Court wants  
17 to do. All this would be alleviated if the two plaintiff  
18 groups would just work together on a set of interrogatories.

19 THE COURT: Now, and Mr. Farrier says it would all be  
20 alleviated if the two plaintiffs groups would work together to  
21 limit themselves to 35 interrogatories.

22 MR. HAHN: Yes.

23 MR. FARRIER: Your Honor, the larger -- from our  
24 perspective, the larger issue is what's reasonable at this  
25 stage of the game. The discovery is going to have the same

1 utility to both parties, once it comes out of us. And so the  
2 idea of having multiple sets of discovery, there's not a real,  
3 I think, defensible rationale for that happening. So the  
4 question really is twofold. One, what's the number. I  
5 thought we reached an agreement on a number, at least with the  
6 homeowners group. And second of all, whether the plaintiffs'  
7 factions are going to work together, as is contemplated, or  
8 they're going to go off and do things separately.

9 THE COURT: But you agree, I think you did, in the  
10 prior hearing, that there are different issues with regard to  
11 the contractors, since your defense is pointing the finger at  
12 them, right?

13 MR. FARRIER: Absolutely. But there's -- I think  
14 that the two parties could use the same document for different  
15 purposes, but the document is the document. We have produced  
16 it. And it's going to be processed, hopefully, in as few  
17 sessions as possible.

18 So I guess, Your Honor, if the question -- and we'll --  
19 Mr. Bryson talked about an agreement. The agreement's really  
20 sort of perspective on our working together and finalizing  
21 some dates, which we think we can do in the next couple days.  
22 So I think that what is going to have to be decided with the  
23 Court is what's the number, and whether the process of  
24 discovery is going to be bifurcated between the PSCs or it's  
25 going to be consolidated. We much prefer that it be

1 consolidated. And coordinated.

2 THE COURT: Mr. Bryson, the quote unquote  
3 "agreement," at least the changes in red, contemplates 35  
4 original requests and then 25 supplemental requests.

5 MR. BRYSON: That's correct, Your Honor.

6 THE COURT: And 25 supplemental requests is -- you  
7 don't know whether they're going to use those or not right  
8 now, right?

9 MR. BRYSON: That's if you're in a deposition and a  
10 witness makes reference to a document or a file that we hadn't  
11 asked for before, that's the thought on that. You know, it  
12 comes up a lot with engineers, there's a file that's  
13 inadvertently not been produced, or there's an article that  
14 hasn't been produced. You know, you ask that that be produced  
15 to you, but sometimes it's not. And so -- or sometimes you  
16 learn issues or topics that you file supplement requests for,  
17 which is, as you know, pretty common.

18 THE COURT: Okay. I think we'll start one step at a  
19 time. We'll limit it to 35 original requests from both  
20 parties. If Mr. Hahn thinks that he needs something else, a  
21 request, he can apply to me, but I need to know XYZ, whatever  
22 they are, okay?

23 MR. HAHN: Thank you, Judge.

24 THE COURT: So that's the good way to start, all  
25 right?

1 MR. BRYSON: So we produce our master set and then  
2 have that for plaintiffs, then send it to Mr. Hahn to review  
3 to see what additional --

4 THE COURT: Sure. You're going to file it in the  
5 case, and I guess you're not going to file discovery, but you  
6 send a copy to Mr. Hahn and Mr. Hahn takes a look at it and  
7 say, I need XYZ, and if he wants XYZ, he sends me a letter,  
8 and you can object or agree or whatever; how's that sound?  
9 Just gets it off the snide, as they say.

10 MR. FARRIER: Just so I'm clear, if a week is the  
11 time that we ultimately agree on that we're going to get this  
12 master set.

13 THE COURT: Week from Friday.

14 MR. FARRIER: Week from Friday. That's going to be  
15 processed by both Mr. Hahn's client and Mr. Bryson's client.  
16 That's going to be that master set.

17 THE COURT: That's the way you think about it?

18 MR. BRYSON: I would prefer that we have the  
19 plaintiffs' set. We can serve it as a joint document, and  
20 then if Mr. Hahn has any requests he wants to add, he would  
21 delineate those contractors' interrogatories or document  
22 requests, and then we would submit that. We would serve that  
23 then as a single master set.

24 THE COURT: How's that? Is that what you want?

25 MR. FARRIER: If that's what I just said, then I

1 think that's right.

2 THE COURT: Don't reverse yourself. If you do that,  
3 you get in trouble.

4 MR. BRYSON: We just want to make sure we keep some  
5 sort of delineation because of these conflicts and things.

6 THE COURT: So there's a master set, and then Mr.  
7 Hahn can make any requests that he wants with regard to his  
8 contractors, as a supplemental request based on what you've  
9 asked.

10 MR. BRYSON: Right.

11 THE COURT: He'll need to see yours before he makes a  
12 decision.

13 MR. BRYSON: Absolutely. And it would be so  
14 designated in our set that this is the contractors' additional  
15 questions.

16 THE COURT: Okay.

17 MR. FARRIER: That set that we get, the initial --  
18 the 35 is going to contain both what the homeowners and the  
19 contractors want from us? That's what I'm hearing.

20 MR. BRYSON: That's correct. You won. That's what  
21 we're doing. But if then the judge said, if Mr. Hahn thinks  
22 that there's additional ones that he needs, he would apply to  
23 the Court for that.

24 MR. FARRIER: That's fine.

25 THE COURT: Everybody got that?

1 MR. HAHN: Yes.

2 THE COURT: Can somebody put that in English in the  
3 order? Okay. Gotcha.

4 MR. BRYSON: Your Honor, the next --

5 THE COURT: All right, we're skipping over the yellow  
6 at the top of the page two, and inspections of defendant's  
7 manufacturing plants, I don't know whether that's a  
8 controversy. There's no footnote there, so I don't know what  
9 that means.

10 MR. BRYSON: Your Honor, it ties into Section E under  
11 document production. What's contemplated, and this was a  
12 contractor addition, that following entry of this order, that  
13 there be a meeting to talk about production of documents,  
14 things of that nature. We don't think that's necessary, and  
15 we'd like to proceed with immediately serving the discovery  
16 requests. We have the ESI order, et cetera. However, we're  
17 negotiating with MI and the contractors' group on this  
18 particular provision. And we'd ask that you hold this portion  
19 of the order open until tomorrow morning on the status  
20 conference, because we think we may have an agreement on a  
21 custodial production of documents and things like that, that  
22 tie into the ESI, that we're still talking about. And if Your  
23 Honor is okay with that --

24 THE COURT: Fine with me.

25 MR. BRYSON: -- we can hold a status conference on

1 this tomorrow morning.

2 THE COURT: That's paragraph E?

3 MR. BRYSON: That's correct.

4 MR. FARRIER: That's fine, Your Honor.

5 THE COURT: Great.

6 MR. BRYSON: The next thing, Your Honor, is Section  
7 G, duration of the examinations. And I think that we -- with  
8 the purple language, we may have had a breakthrough there.  
9 Our concern was that at seven hours there be a technical or an  
10 engineer or an expert that has a lot of information, we get to  
11 Pennsylvania or wherever, and you know, it's 5:00 o'clock and  
12 it's like, We're done. And I think we have got some language  
13 that I think alleviates our concerns, MI can live with, so I  
14 think that G is pretty much agreed to.

15 MR. FARRIER: Your Honor, I think that G -- my read  
16 of it is it's consistent with the Federal Rules, that there's  
17 a presumptive limitation. If they need to go over for an  
18 hour, they're going to ask us, and we'll say yea or nay. If  
19 there's a problem, somebody -- you're going to get a call.

20 THE COURT: That's fine.

21 MR. HAHN: We can live with that, Judge.

22 THE COURT: Sounds good.

23 MR. BRYSON: We've agreed, we've agreed to a number  
24 of depositions. The 25, speeding right along, I think now you  
25 go --

1 MR. FARRIER: I think that's it.

2 MR. BRYSON: I think there was an issue -- there was  
3 some language we added in under Section C, and this bears some  
4 mentioning. It's just coordination. If there are separate  
5 State Court actions, we changed the language on that, you can  
6 see the red, bring it to the Court's attention. The parties  
7 will negotiate coordination of discovery with State Court  
8 actions when and if the situation arises, and submit a  
9 separate CMO on this issue. I think there is already a  
10 separate state action that's been filed. We probably need to,  
11 at the status conference, report on that actually, as to what  
12 that action is, make sure the Court's aware.

13 THE COURT: Have we got some State Court actions?

14 MR. FARRIER: A Jeff Leaf has filed a lawsuit, I  
15 think in York County.

16 THE COURT: I can squash him, and will. All right.  
17 So if you can -- and I think this worked pretty successfully,  
18 Mr. Hahn, that if you can identify State Court actions and  
19 State Court judges -- of course, I don't know whether this  
20 is -- in South Carolina the judges rotate, so -- but I'd be  
21 glad to reach out and call the State Court judges. And we had  
22 coordinated with State Court and Federal Court hearings, and  
23 try to get it so -- for everybody's purposes, we're all in the  
24 same boat. And so if you just identify them and let me know  
25 who they are, you know, sometimes they're -- State Court

1 judges are great, sometimes they blow me off, but I don't  
2 care.

3 MR. FARRIER: Your Honor, we'll provide that in an  
4 e-mail, the contact information, it's a large number, et  
5 cetera.

6 MR. BRYSON: And what was addressed in this discovery  
7 order is, you know, just making sure there was a process that  
8 protects us, that attorney may reach out to us, wanting  
9 documents we've got, they may send the document requests,  
10 discovery requests to MI, and that's something that will  
11 probably need to be dealt with sooner than later, if that  
12 attorney -- if their action is not stayed or perhaps put on  
13 the back burner. But I'm sure they'll probably be wanting to  
14 proceed with discovery.

15 THE COURT: Okay. Yeah.

16 MR. HAHN: Can we go back to E?

17 THE COURT: Sure.

18 MR. HAHN: I didn't understand we had an agreement.  
19 Y'all had this sort of -- what are --

20 MR. FARRIER: I don't think we have. My  
21 understanding from discussions with you and with the other  
22 PSC, is that we have conceptual agreement, more fully  
23 articulated, frankly, with the contractor plaintiffs about the  
24 sequence and timing of discovery. Mr. Bryson has talked about  
25 that.

1 THE COURT: I think y'all said you're going to  
2 continue to talk about it, and we'll address it in the  
3 morning.

4 MR. BRYSON: It's Mr. Hahn's proposal on this, but  
5 we're wanting to know more about it before we would agree to  
6 it.

7 THE COURT: So --

8 MR. HAHN: We're all meeting after this?

9 MR. FARRIER: Correct.

10 MR. HAHN: That's what I need to know, Judge.

11 THE COURT: So we're not going to address this till  
12 tomorrow?

13 MR. HAHN: Apparently.

14 THE COURT: Okay.

15 MR. BRYSON: Judge, that's it on the CMOs.

16 THE COURT: Okay.

17 MR. BRYSON: And we'll get a revised version  
18 submitted to you based on where we end up with --

19 THE COURT: Bring it to me in the morning, make sure  
20 everybody has read it, and we'll go with it and go from there,  
21 okay? Okay.

22 MR. LUCEY: Your Honor, the last one is CMO-4, and  
23 we've submitted some papers to you. Mr. Gupta with our PSC  
24 would like to address Your Honor with regard to that proposed  
25 CMO. He's with Mr. Richard Arsenault's office.

1 MR. GUPTA: Good afternoon, Your Honor, Srivatsa  
2 Gupta for the plaintiffs.

3 You know, I was really moved by Mr. Farrier's earlier  
4 words that one of the things we're trying to do here is  
5 anticipate and resolve issues that may arise in the  
6 litigation. And that's exactly what this CMO that we've  
7 proposed is designed to do.

8 I understand that defendants have a philosophical  
9 objection and, you know, they believe that this kind of order  
10 is unnecessary and superfluous. I would maintain that it's  
11 not.

12 You know, and I apologize to the --

13 THE COURT: Unless he's not going to assert any  
14 privileges, then it probably is.

15 MR. GUPTA: Maybe then I believe the other word he  
16 used was premature, and that may more accurately characterize  
17 the defendant's feelings.

18 You know, I apologize to the Court for submitting the  
19 lengthy supplement background material, and I hope that the  
20 Court had the time to review it.

21 THE COURT: I read Professor Rice's report with great  
22 interest.

23 MR. GUPTA: Well, then, Your Honor, you saw the issue  
24 that arose in Vioxx where the plaintiffs and the defendants  
25 had differing views on whether documents were privileged. And

1 His Honor, Eldon Fallon, from the Eastern District of  
2 Louisiana, reviewed, had something like 80 boxes of documents  
3 for in camera review, and decided that of the 8000, only about  
4 500 were actually privileged. And that the defendants were  
5 not happy with this ruling, and filed a Writ of Mandamus to  
6 the Fifth Circuit, who suggested but did not order that a  
7 representative selection of the documents needed to be  
8 re-reviewed.

9 You know, in that case a special master was hired to  
10 handle that situation, at great cost, on the order of half a  
11 million dollars. And so since that experience, you know,  
12 plaintiffs have been trying to put in an order in advance, to  
13 avoid that kind of scenario in the future. The proposed order  
14 we provided the Court is the result of negotiations and other  
15 MDLs with sophisticated defendants and sophisticated defense  
16 counsel. It's not a plaintiffs' wish list. We're not trying  
17 to put one over on the defendants; we think it's an accurate  
18 statement of the law of privilege and what is necessary to  
19 assert it.

20 You know, it's our position that by dealing with this now,  
21 the defendants will be able to know specifically which  
22 elements they need to put into a privilege log in order not to  
23 inadvertently waive privilege.

24 I know Mr. Smith represented in the ESI negotiations that  
25 defendants do not plan on waiving any privileges. And, you

1 know, as is well settled in the Fourth Circuit, the penalty  
2 for an insufficient privilege log is a waiver of that  
3 privilege.

4 So all we're trying to do is put into writing exactly  
5 what's necessary to avoid an impasse in the future.

6 Thank you.

7 MR. FARRIER: I have a little packet that will be  
8 assembled for you in a moment, Your Honor.

9 You know, our problem with -- we've got some specific  
10 problems with case management order number four as proposed.  
11 But I want to talk about the overall problem. And our overall  
12 problem really is not one of convenience and not one of really  
13 anticipation, but is a constitutional problem.

14 There's a distinction between choice of law between state  
15 law, which would govern the issue of privilege, and federal  
16 law. And, in fact, if you look at the history of Judge Fallon  
17 and some of the orders that were passed up, you can see  
18 exactly how that played out. Because Judge Fallon originally,  
19 after an extensive discovery dispute in Vioxx, issued a very  
20 lengthy order, just like the one that's been submitted to the  
21 Court.

22 And what he tried to do was anticipate problems, and  
23 short-circuit those problems by saying that we're going to  
24 adopt a federal body of common law that we're going to apply  
25 to these privilege issues as they come up in the case. That

1 caused him to personally review these 20,000 or so documents,  
2 and to make judgments under those documents.

3 Based on that original ruling in his CMO, similar to  
4 CMO-4, if you look at the first page of the proposed CMO-4,  
5 under Roman two, you'll see a statement, "The parties have  
6 agreed that federal common law governing privilege applies,  
7 including the general and specific principles set forth in In  
8 Re: Vioxx Products Liability."

9 (Brief interruption in proceedings.)

10 MR. FARRIER: Your Honor, first thing I'd like to  
11 direct you to is U.S. In Re: Vioxx, March 6, 2007, which is  
12 2007 Westlaw 854251. And even Judge Fallon at the time  
13 recognizes this overall principle that I just noted to you on  
14 page two under Roman three A, although state law applies to  
15 Merck's attorney-client privilege, the Work Product Doctrine,  
16 as a matter of federal law -- this order, by the way, merges  
17 those two doctrines -- the Work Product Doctrine is distinct  
18 from, broader than the attorney-client privilege.

19 He goes on to create the same compromise standard that's  
20 being proposed to you in this proposed CMO-4. And that is set  
21 forth in 501 F.Supp. 789. That's the In Re: Vioxx opinion.  
22 On page five under Roman two, accordingly, the Court will now  
23 reproduce the substantive portion of special master's report,  
24 and goes on to set forth this federal standard in the  
25 carryover page; the same one that's being proposed here.

1           The next opinion is the Fifth Circuit's review of this  
2     process.

3           THE COURT: Is that what you supposedly gave me?

4           MR. FARRIER: I thought it was.

5           THE COURT: What I've got is Chinese Manufactured  
6     Drywall, Yaz and Caremark Health.

7           MR. FARRIER: Your Honor, I'll provide copies of  
8     this. I don't want to hold things up, but I'll get them to  
9     everyone today.

10          THE COURT: That's fine, my clerks have already  
11     memorized those, so that's all right.

12          MR. FARRIER: And the Court addresses Judge Fallon's  
13     approach, the Fifth Circuit. And without quoting it, it says  
14     that while this is expedient, it violates constitutional  
15     principles. That ultimately the Court is going to have to  
16     deal with state privilege issues by each state's law. And  
17     that the idea of supplanting the law with a compromised  
18     federal standard is inappropriate. The one case that I did  
19     send you, the In Re: Yasmin and Yaz, discusses this same  
20     issue.

21          So, Your Honor, as these privilege issues are going to  
22     arise, assuming they do, we're going to have to look at the  
23     brief and discuss those according to the state in which they  
24     arise. That state's law is going to determine choice of law,  
25     and it's going to determine the privilege issue. And there's

1 no way to shortcut that, as this order attempts to do.

2 There are a couple of other things that I would, just in  
3 flipping through this, I'd like to point out. In the proposed  
4 order under A, general principles, you have a set of  
5 standards, the attorney-client privilege applies if -- and  
6 this is the Vioxx standard, this is the compromise standard  
7 adopted in Vioxx, and the one that was ultimately rejected.

8 There are other issues in here that are specific to this  
9 case, that we raised when we discussed CMO-4. There's a  
10 portion of this that deals with redaction of confidential,  
11 irrelevant and privileged information. We already have a  
12 local rule that addresses that, which is the ECF Rule 13.4.3.  
13 This is either redundant, or in some cases inconsistent with  
14 the local rule on this issue. So there's no need for this.

15 And finally, under privilege dispute procedure, we're not  
16 amenable to agreeing that if we don't specifically follow this  
17 privilege dispute procedure, we will be deemed to have waived  
18 the attorney-client privilege.

19 What we would propose, Your Honor, if the Court -- first  
20 of all, we don't think an order is necessary. We think we're  
21 going to have to address attorney-client privileges as we move  
22 along. We don't know what that's going to look like. We  
23 don't think we can anticipate and circumscribe how we're going  
24 to claim a privilege in a specific state. But as those issues  
25 arise, the Court will have to deal with them. There's a body

1 of federal and state law which governs that, and it shouldn't  
2 be modified for the sake of having a compromised standard.

3 What we had drafted but had not submitted to the Court was  
4 a very short order. What I handed up was Judge Fallon's more  
5 recent order, which is a four-page order, which sets forth  
6 some general standards. And if the Court believes an order is  
7 necessary to cover the scope, as anticipated in the CMO-4, we  
8 don't think it's necessary, but if the Court believes one is,  
9 then we're prepared to submit an order in line with Judge  
10 Fallon's more recent order.

11 THE COURT: Okay. Assuming for the purposes of this  
12 that -- We're going to get to privilege, everybody knows that.  
13 It would probably help everybody in the litigation at least to  
14 agree on what has been identified in the privilege log.  
15 Because I think in every state, no matter if there's a  
16 privilege asserted, you have to submit a privilege log, and  
17 the information on the privilege log is the starting point for  
18 any analysis. And in my experience, the paucity of  
19 information or the incorrect information on a privilege log  
20 makes everybody's job a lot harder. I don't really care about  
21 making your job a lot harder, but I care about making my job a  
22 lot harder a lot.

23 Yes, ma'am.

24 MS. LUMPKIN: Well, I have a request for  
25 clarification on that, Your Honor. Are you addressing with

1 Mr. Farrier whether we should have some type of protocol on  
2 the privilege logs that will be produced in this case, by  
3 state? Will it be by state, how are you looking to state law  
4 on the privilege issue, or do you want a protocol that's just  
5 going to be more general, understanding that within that, we'd  
6 look to the state law with regard to the privilege issue?

7 THE COURT: Yes, sir?

8 MR. LUCEY: Plaintiffs would submit that's getting  
9 more complicated than necessary. And if I may approach the  
10 bench and hand up to the bench, there actually has been one  
11 privilege log produced in this case by MI. I believe the  
12 Court will agree that it was very inadequate and doesn't  
13 address any of the issues necessary for plaintiffs to  
14 adequately determine the privilege they asserted, and whether  
15 or not it can be challenged. So the point of that is we're  
16 here now, we already have the privilege problem.

17 If I might suggest to the Court to shortcut this, it seems  
18 as though the principles set forth in Vioxx are well put and  
19 well said and generally applicable. And to the extent that  
20 they quoted the constitutional issue correctly, and I don't  
21 have a copy of the case in front of me, I might suggest that  
22 we could go with the attorney-client privilege and Work  
23 Product Doctrine order, with a safe harbor caveat. And the  
24 safe harbor caveat would reserve to any party that finds a  
25 material difference in state law that's applicable to their

1 claim of privilege, reserves to that party the right to bring  
2 it to the Court's attention. So we're not actually  
3 establishing a federal common law as to privilege, we're  
4 establishing a set of case management principles, which any  
5 party can ask for variance of, if they can show a material  
6 variance in state law.

7 MS. LUMPKIN: Your Honor, if I may follow up on that?

8 THE COURT: Sure.

9 MS. LUMPKIN: As to the Johnson privilege log that  
10 pertains to Johnson, it's before this MDL even, you know -- as  
11 a matter of fact, I don't even know it's on there, because  
12 we're not counsel, we weren't counsel in Johnson. But we  
13 certainly understand the need going forward for some type of  
14 protocol, and we certainly would be happy to work through  
15 that.

16 When this was first proposed to us, we want to thank  
17 plaintiffs' counsel, because they were very helpful in  
18 providing some samples, which is what was attached to the  
19 CMO-4 that was filed yesterday. The reason we objected is  
20 primarily not only because, as Mr. Farrier has pointed out,  
21 there's just misstatements of the law within the proposed CMO,  
22 but also because it is premature. None of the cases that are  
23 attached to the CMO-4 proposed by the plaintiffs had this type  
24 of order entered in the inception. As a matter of fact, in  
25 Vioxx, 2.3 million documents had already been produced, and

1 there was a 30,000 document privilege log that the judge had  
2 gone through and that had been presented to the Court, there  
3 are numerous motions to compel. The same with the Avandia  
4 case. In the Avandia case there was a seventh R and R from a  
5 Magistrate Judge before the Court went through this analysis.  
6 Because, frankly, it is a painful analysis when you're dealing  
7 with State Court actions that are part of an MDL.

8 When the Fifth Circuit went back on the Vioxx case and  
9 sent it back to Judge Fallon, one of the things the Circuit  
10 pointed out is MDLs, while consolidation is intended to be  
11 beneficial and create some kind of efficiency, it's not a  
12 process that doesn't have tremendous strains with it. And  
13 this privilege analysis is one of them.

14 So one of the things that we point out is that it is  
15 somewhat premature now. And the reason we provided the Court  
16 with Judge Fallon's latest and most recent opinion in Drywall,  
17 is because I think Judge Fallon himself, after going through  
18 the analysis in In Re: Vioxx back in 2007, and after going  
19 back up to the Fifth and coming back down, I think Judge  
20 Fallon realized that a four-page order might be more in order  
21 with regard to this type of issue in a case such as an MDL  
22 like this.

23 Avandia, Pinnacle, Actos, all of those cases that are  
24 attached as samples, were MDLs where these types of orders  
25 were entered, but after numerous discovery disputes, after

1 millions of documents, all within the context of pharma cases  
2 or medical devices where you had, you know, wrongful death,  
3 you had all kinds of issues, highly regulated type of  
4 industry, where the privilege or work product was certainly  
5 going to be scrutinized by a Court. We've got leaky windows,  
6 if at all.

7 So it is somewhat premature. And while we recognize that  
8 there may be a need going forward, we really believe that  
9 something as, frankly, the CMO proposed would have to be  
10 revised substantially, but we would think something more akin  
11 to what Judge Fallon has now entered in Drywall would be  
12 appropriate in this case.

13 THE COURT: Yes, sir.

14 MR. GUPTA: Your Honor, I'd just like to state two  
15 quick corrections. In the Actos case, the order was entered  
16 before the commencement of discovery, for the commencement of  
17 written discovery. And in the Pinnacle it was entered before  
18 written discovery, but much of that discovery had already been  
19 produced in a similar case, and it was just cross noticed.

20 You know, what I'm hearing from the defendants is a little  
21 different than what they gave us in their letter yesterday or  
22 to the Court, which was a philosophical objection. Here,  
23 they've got specific examples of what's wrong with the order.  
24 And, you know, we provided a copy of this to the defendants  
25 about a month ago. And we had a meet and confer where we

1 asked them specifically for problems they had, examples of  
2 misstatements of the law or corrections that may apply, and we  
3 got zero response.

4 We're happy to negotiate this order. You know, if there  
5 are misstatements of the law, it's my understanding that MI  
6 Windows is a California corporation with a principal place of  
7 business in Pennsylvania. I'm sure they have operations in  
8 other states; I'm sure they don't have operations in every  
9 state. You know, both the plaintiffs and defendants just  
10 briefed and argued ten different state laws this week. You  
11 know, I'm sure we can find the applicable privileges and set  
12 out what the law is, if the defendants are willing.

13 THE COURT: Yes, ma'am?

14 MS. LUMPKIN: In the Yasmin case that Mr. Farrier  
15 handed up, the Court took it upon itself to go through the  
16 Vioxx case and explain why the Vioxx approach was not the  
17 appropriate approach, given what the laws require and 501, FRA  
18 501 requires.

19 There is -- it's pretty established law that if the claims  
20 arising in an MDL come from state claims, state law applies to  
21 the privilege. And there's a big difference between --  
22 obviously Your Honor is aware of -- between the immunity, the  
23 doctrine, and the privilege issue. The doctrine, the Work  
24 Product Doctrine, certainly can be addressed through federal  
25 law. But the privilege issue has to be analyzed under a

1 choice of law, and then privilege law within the state, which  
2 is why this seems a bit premature at this inception of the  
3 case.

4 And I stand corrected, because I wasn't part of that  
5 litigation, so I'm sorry about that. I think there was like  
6 case management number six, a little further along than ours.

7 But having said that, one of the things that the judge  
8 analyzed in the Yasmin case is that he looked at and  
9 determined that there are three types of cases in an MDL. You  
10 have the cases filed directly to the MDL, you have the cases  
11 that have been transferred from another jurisdiction, which is  
12 what we have here, and you have the cases that originated  
13 outside the jurisdiction, and then become part of an MDL or  
14 filed with the MDL. And the judge went through very very  
15 specifically and, you know, methodically and analyzed why and  
16 when you have to apply state law and when you look to the  
17 federal law. If you have federal defenses or federal claims  
18 within the MDL, then you have to look to federal law. But in  
19 a case like this, which is based on diversity, the state  
20 claims would dictate. And depending on the jurisdiction that  
21 you're in and we're looking to, there's a different standard  
22 as to what choice of law. And I recognize it's burdensome and  
23 I recognize it's a painful process, but frankly, that's what  
24 the law requires. And the MDL does not excuse that.

25 THE COURT: All right. So I'll take a look at -- I

1 would encourage you to get together and try to negotiate at  
2 least some kind of procedure, especially with regard to  
3 identification of documents and privilege logs. I mean,  
4 that's the starting point in any analysis of privilege, is if  
5 you assert privilege, then you put a privilege log, and a  
6 privilege log ought to have enough information for someone to  
7 be able to look at it and have a good idea what's in the  
8 document itself.

9 MS. LUMPKIN: Yes, Your Honor.

10 MR. FARRIER: Your Honor, that's -- I guess what --  
11 We're fine with that. We think that the law requires us to,  
12 if we're going to claim privilege, to create a privilege log,  
13 to put information on there sufficient for the other side to  
14 understand what the document is, what the nature of the  
15 privilege is, why it's being asserted as to this document.  
16 For instance, why the distribution of the document that might  
17 cancel that.

18 I do think that there's a problem with, at this point, and  
19 we don't know what documents are, what sort of language is out  
20 there. But to the extent that the Court would be helped by  
21 having an order in place with some of that structure, we'll be  
22 glad to work with the other side towards that end.

23 THE COURT: All right. Yes, sir?

24 MR. GUPTA: I would just note that the Fourth Circuit  
25 Interbake Foods case that's cited in the order does require a

1 party who is using a privilege log to assert privilege, the  
2 log must, quote, "...as to each document, set forth specific  
3 facts that, if credited, would suffice to establish each  
4 element of the privilege or immunity that is claimed."

5 MR. FARRIER: We'll do that.

6 THE COURT: All right, thanks.

7 MR. GUPTA: Thank you, Your Honor.

8 THE COURT: What else have we got this afternoon?

9 Yes, sir, Mr. Hahn?

10 MR. HAHN: Your Honor, this kind of goes back to what  
11 we were talking about earlier, the letter that Mr. Lucey  
12 handed up to the Court, this is the first time contractors  
13 have heard that a subpoena existed, much less that 2500  
14 documents were produced on June 25th. We know nothing about  
15 any of this. And which highlights the issue that we're  
16 talking about, that we need a standard, Judge, so that we can  
17 see the documents as they're produced.

18 THE COURT: All right. So --

19 MR. BRYSON: Your Honor, I think on the agenda I was  
20 looking --

21 THE COURT: So I guess maybe the answer to the  
22 question is why didn't other parties get a copy of the  
23 documents that were produced by the defendant in this case?

24 MR. LUCEY: Your Honor, I'll be happy to research  
25 that. My memory is a subpoena was issued long before any of

1 these cases got MDL, and that this privilege log actually came  
2 after the documents. But this was only in -- the subpoena was  
3 issued in Johnson, not in the MDL. And I am sure it predated  
4 it by many months. Johnson, of course, has been pending for  
5 several years.

6 THE COURT: Sure.

7 MR. HAHN: Judge, it's part of the MDL, Judge, and  
8 this clearly says, talks about the documents.

9 MR. BRYSON: I haven't seen them either, Your Honor,  
10 nor any of the attorneys in the other state, just pending  
11 these proceedings, so Mr. Hahn hasn't missed anything. I  
12 mean, those documents haven't been produced among the various  
13 plaintiffs. Can they?

14 MR. LUCEY: We're under a Johnson confidentiality  
15 agreement which I think is being broadened or has been  
16 broadened, but many times on the record MI has limited our  
17 ability to share with any other counsel until those matters  
18 are finalized.

19 MR. BRYSON: Can we see them now?

20 MR. HAHN: Mr. Ouzts is in the courtroom; maybe he  
21 can tell us.

22 MR. OUZTS: I don't have a perfect recollection of  
23 what happened, but these documents were not produced by MI  
24 directly, they were produced by a third party, independent  
25 third-party vendor, in response to a subpoena that was issued

1 in the Johnson case, directly to Fenestration Services, Inc.  
2 Fenestration Services hired an attorney to assist them in  
3 responding to the subpoena. The attorney requested and was  
4 granted at least one extension of time to respond to the  
5 subpoena, and maybe even more time; I'm not real clear on  
6 that.

7 And because there was a confidentiality provision in the  
8 contract between Fenestration Services and MI Windows, it was  
9 agreed between counsel for Nadine Johnson and counsel for MI  
10 Windows, that counsel for MI Windows would review the  
11 documents that had been selected by Fenestration Services for  
12 production, for the purpose of marking any documents that were  
13 privileged or confidential, which is how we ended up with the  
14 documents and reviewing them before they were produced to  
15 Mr. Lucey's firm. Now, where the MDL action stood at that  
16 point in time, I am not clear. I don't remember the dates.  
17 But those were the essential circumstances of the production.

18 THE COURT: So if I understand correctly, MI Windows  
19 does not have any objection for Mr. Lucey to turn over FEN-1  
20 through 2466 to the other members of the homeowners or the  
21 contractors, is that right?

22 MR. OUZTS: No, Your Honor.

23 MS. LUMPKIN: No, Your Honor.

24 MR. OUZTS: And that was another issue in the case,  
25 the confidentiality order had not been entered as of that

1 time. They were produced with an understanding that  
2 plaintiffs' counsel would treat them as confidential under the  
3 proposed order. But we have no objection to those documents  
4 being supplied.

5 THE COURT: Now, Mr. Lucey, you can feel free to  
6 share them with whoever you want to share them with.

7 MR. LUCEY: Thank you, sir.

8 THE COURT: Now, Mr. Hahn, you're now even with  
9 Mr. Bryson, you both will be able to read something on the way  
10 home.

11 MR. HAHN: Thank you, Judge.

12 THE COURT: You're welcome.

13 MR. BRYSON: Your Honor, as I look at the -- we have  
14 kind of two agendas, our agenda and MI's agenda. And some of  
15 the things that are on their agenda, home inspections, you  
16 know, on our agenda, protocol of inspection of homes; other  
17 one, inspection of factories, you know, things of that nature,  
18 I think that's where we're going to try to address in this  
19 continuing discussion that we're having that we'll resume with  
20 the Court tomorrow morning on perhaps rolling custodial  
21 document production, things of that nature. So I would ask  
22 that that be put off.

23 Looking at MI's agenda, I'm down then, I think, to number  
24 nine, which says joinder of Lakes of Summerville and Johnson,  
25 that's for tomorrow, correct?

1 THE COURT: Yes, that's tomorrow morning.

2 MR. HAHN: Yes, Your Honor, 2:00 o'clock?

3 THE COURT: Yeah.

4 MR. BRYSON: Then looking at our agenda, I think this  
5 protocol for inspection, you know, we need to raise with MI as  
6 well, and I'm not sure this is on the agenda as part of it,  
7 preservation of evidence by the defendants with regard to  
8 windows, exemplars of windows, windows of these particular  
9 series that are at issue, making sure they don't destroy any  
10 of those, if they're in warehouses or manufacturing  
11 facilities, things like that, we want to address that with  
12 them. But it's kind of like a litigation hold kind of deal.  
13 But I don't envision problems with that, but just to bring  
14 that to the Court's attention, we're turning our attention to  
15 that.

16 We don't have anything else other than some thoughts we  
17 have about the next status conference.

18 MR. LUCEY: With the caveat that the scheduling item  
19 that we're dealing with, we have agreed to try to resolve by  
20 tomorrow the initial scheduling item. And the only one we  
21 care about for now is the lifting of the stay on discovery,  
22 which I think was timely. And either we're going to go to the  
23 rules and submit discovery, or we're going to have agreed to a  
24 rolling production with the defendants that we'll put on the  
25 record tomorrow. But that one last scheduling thing.

1 THE COURT: So we'll take care of that tomorrow.  
2 We'll either decide it or agree on it by tomorrow, right?

3 MR. BRYSON: That's correct.

4 MR. HAHN: Judge, when do you want us here tomorrow  
5 for that issue?

6 THE COURT: I don't know what the schedule is  
7 tomorrow. The first argument is 9:30, isn't that right?

8 MR. HAHN: We're showing 9:00 o'clock, Your Honor,  
9 for DeBlaker motion to reconsider; 10:30 Hildebrand; and then  
10 2:00 o'clock was the contractor.

11 THE COURT: You want to come tomorrow morning and  
12 we'll just knock yours out when everything is over with,  
13 rather than come tomorrow afternoon? You'll be here anyway.

14 MR. BRYSON: I envision tomorrow will go pretty  
15 swiftly as well.

16 THE COURT: Why don't you come tomorrow morning. You  
17 want to be here anyway, so we'll argue it when we get  
18 everything else done.

19 MR. BRYSON: We're starting at 9:30 or 9:00?

20 THE COURT: 9:00 o'clock.

21 MR. BRYSON: Your Honor, the last thing, with regard  
22 to the next status conference, if we understood Your Honor  
23 correctly, the only time you had in November would have been  
24 that last week in November?

25 THE COURT: I mean, I've got Thanksgiving week, but

1 nobody wants to do it Thanksgiving week. If you want to do it  
2 Thanksgiving week, I'm close to home, we'll have it here, but  
3 you can explain to your families. So I was thinking maybe --  
4 I've checked on the trial for the first two weeks in November,  
5 it's still going forward, it's a huge terrible case that  
6 Mr. Farrier's ex-partner, if he gets squashed, he's really  
7 going to get squashed in this one. But so when I said the  
8 27th, that's a Tuesday, so everybody doesn't have to travel  
9 Sunday, so that's fine, and we can do it anywhere you want to  
10 do it.

11 MR. BRYSON: Here's our proposal, Your Honor. We  
12 propose the status conference be on November 29th in New  
13 Orleans. And the reason for that would be, on the 30th there  
14 is a seminar, the Louisiana State Bar Association has a  
15 seminar on complex litigation. I understand it would be the  
16 twelfth annual complex litigation seminar. Speaking at that  
17 seminar are a number of MDL judges, Judge Fallon and some  
18 others. Mr. Gupta can address it, his firm is very involved  
19 with it; a number of defense firms are involved as well.

20 And I believe that -- not I believe -- I know that  
21 Mr. Gupta's firm, he's involved with that seminar, would like  
22 to extend an invitation to Your Honor to speak on the 30th at  
23 this seminar on a panel with Judge Fallon and a couple other  
24 MDL judges. And also invite K&L Gates; there are some other  
25 slots open, and I'd invite K&L Gates to speak at the seminar.

1           So that there would be the status conference on the 29th,  
2           the Louisiana seminar involving complex litigation would be on  
3           the 30th, and then that way for everyone involved they could  
4           maybe do a little CLE, see New Orleans a little bit, those  
5           that wanted to go a little bit superfluous. But our proposal  
6           would be for the status conference to be on the 29th.

7           I'd ask Mr. Gupta to provide a bit more information about  
8           it. We have forwarded an e-mail to K&L Gates giving them  
9           information about the seminar, so they can see it's not a  
10          seminar that's -- you know, it's a balanced seminar. And  
11          certainly the plaintiffs, we would agree, if they speak at it  
12          or I'm scheduled to speak at it, no one is going to be  
13          subpoenaing the other and using it as evidence in this trial,  
14          it's just a seminar. But I think what's particularly  
15          interesting are a number of the other MDL judges who would be  
16          speaking at this.

17                 THE COURT: Okay.

18                 MR. FARRIER: Your Honor, that's an issue that sounds  
19          like a lot of fun. I love New Orleans. I just got back from  
20          a wedding with a couple of my daughters. It does present an  
21          expense to the client that, I mean, I really don't feel  
22          comfortable consenting to taking a small army to New Orleans.  
23          And frankly, I hate to deprive the Court of an opportunity to  
24          speak at the seminar, or maybe one of us, but it is -- I think  
25          it would be a fairly significant expense. It's something we'd

1 have to look into.

2 THE COURT: Of course, the expense, there's also  
3 these folks over here who have had to undergo the expense to  
4 come to Charleston several times, and I think it's only fair  
5 to go to wherever some of these folks are. I mean, I think  
6 New Orleans is probably nicer in late November than Chicago  
7 is, not denigrating anything. You can deal without a small  
8 army, just have a tiny army.

9 I guess it would depend upon what's being discussed and  
10 how substantive everything is going to be and all that. I  
11 mean, you know that in the long run, but I don't have any  
12 problem, I don't know about speaking, because I'm supposed  
13 to -- again, I'm supposed to be in Chicago -- the 29th -- 27th  
14 is a Tuesday, 29th is a Thursday, I guess?

15 MR. GUPTA: That's correct.

16 THE COURT: I have to go to Chicago on Friday because  
17 my wife's working in Chicago that weekend and it's her  
18 birthday that weekend, so I may not be able to stay for the  
19 seminar, but I'd like to stay for the seminar personally. But  
20 I'll cross that bridge when we come to it.

21 So right now tentatively why don't we set it for the  
22 29th in New Orleans. And we can discuss whatever matters are  
23 pending at that time. All right?

24 MR. GUPTA: Your Honor, my firm would be happy to  
25 coordinate any matters that need to take place for us to have

1 that status conference there.

2 THE COURT: And if you can send us some information  
3 with regard to that seminar, if I --

4 MR. GUPTA: We'd be happy to, sir.

5 MR. BRYSON: Your Honor, should Mr. Gupta perhaps  
6 coordinate with someone on the Federal Court staff to make  
7 sure the courtroom availability, things of that nature?

8 THE COURT: I'll talk to Judge Fallon or I'll get a  
9 courtroom available. We'll call down there.

10 MR. BRYSON: Let us know.

11 MR. GUPTA: Thank you, Your Honor.

12 MR. HAHN: One other quick matter, Your Honor, since  
13 we're all here. There was an issue with confidentiality of  
14 some additional documents that Mr. Lucey has. And since  
15 everybody is here, will MI waive that confidentiality so he  
16 can produce those to the PSC as well?

17 THE COURT: You mean the ones he subpoenaed himself?

18 MR. HAHN: Yes, sir.

19 MS. LUMPKIN: Your Honor, we can't agree to that.  
20 One, because there was a reason there was a confidentiality in  
21 place. Two, and a return, part of it was a return of the  
22 documents. Two, we were not counsel of record on that case;  
23 we need to know what was provided to Mr. Lucey and have the  
24 client go through that. We don't know what Mr. Lucey has in  
25 his possession, because we weren't counsel of record, we don't

1 know.

2 MR. LUCEY: Mr. Ouzts' firm was counsel of record, so  
3 they were all Bates stamped and recorded, so they do, in fact,  
4 know what I have, first. Second, I believe if we clarify some  
5 wording, I don't think Mr. Hahn's requesting a release of  
6 confidentiality as to the documents generally, he's requesting  
7 we confirm that he's allowed to see them under the existing  
8 confidentiality agreement. As I understand it, they've  
9 already consented for those documents to be under that  
10 confidentiality agreement. I'm bound by it. And since we  
11 have a global confidentiality agreement, I can now share those  
12 with Mr. Hahn. And just lastly, make sure the record's  
13 absolutely clear, some of those documents -- in fact, maybe  
14 perhaps most of them, are not stamped confidential and are not  
15 confidential. They were either stamped at the time or not.  
16 We have simply kept them as one group of documents.

17 MS. LUMPKIN: Well, Your Honor, that goes to the  
18 heart of the issue. We weren't counsel of record, we don't  
19 know if things were properly marked confidential. I think the  
20 client has a right to determine whether --

21 THE COURT: I don't think you get two bites at that  
22 apple.

23 MS. LUMPKIN: But, Your Honor, it's not the same  
24 case, and there's a case where there's an agreement between  
25 counsel that are not present, because Mr. Ouzts was not

1 involved in that case.

2 THE COURT: Well, he just said that Mr. Ouzts' firm  
3 was involved in the case.

4 MS. LUMPKIN: The firm was, but Mr. Ouzts had nothing  
5 to do with that case. So my concern is we're -- One of the  
6 things that was agreed to in May on record by Mr. Lucey was  
7 that although he had subpoenaed the records, the documents  
8 back to him, as a way of getting around the agreement he had  
9 entered into with previous counsel, he would not be sharing  
10 that with other lawyers in this case and the MDL. That's on  
11 the record. If we're going to consider that, then we should  
12 be given the opportunity to review them.

13 MR. LUCEY: The only documents that had an obligation  
14 to return, that had to be subpoenaed, were the documents  
15 stamped confidential. And honestly, I couldn't tell you right  
16 now if ten percent of them are stamped or 90 percent of them  
17 are stamped. But at any rate, there are some stamped and  
18 there are some that are not stamped.

19 THE COURT: What about it, Mr. Ouzts?

20 MR. OUZTS: Your Honor, I'd have to look at the  
21 documents. I thought -- Well, the problem is that the  
22 documents were produced in a redacted form. We redacted  
23 privacy information, things like street addresses -- Oh,  
24 you're talking about the Tennyson Row documents?

25 THE COURT: Yeah.

1 MR. OUZTS: I was not involved in the Tennyson Row  
2 case. I really have no firsthand information about the  
3 circumstances of --

4 THE COURT: Your firm was involved in the Tennyson  
5 Row case?

6 MR. OUZTS: Yes, David Cobb was involved in it, but I  
7 personally was not involved in the Tennyson Row case.

8 MS. LUMPKIN: Your Honor, may we be given the  
9 opportunity to review whatever the agreement is between  
10 Mr. Lucey --

11 THE COURT: I assume we'd have to waive the  
12 confidentiality order so you can see them, right?

13 MS. LUMPKIN: If that's the agreement between them  
14 regarding the return of documents, because I'm not sure that  
15 it only -- they only agreed to return confidential documents.  
16 I don't know that.

17 MR. BRYSON: Your Honor, I don't get it. You know,  
18 in this case, this Johnson case is still part of this MDL.  
19 Documents have been produced, they had attorneys. Mr. -- to  
20 Mr. Lucey -- I'm sorry, in the Tennyson Row case, documents  
21 were produced by MI, you had attorneys, MI had attorneys, you  
22 looked at the documents, he has the documents, I don't see why  
23 we can't get the documents now.

24 And I think Your Honor actually addressed this somewhat  
25 when they brought this up at our initial status conference,

1 that you were hopeful that we would get the documents sooner  
2 rather than later.

3 MS. LUMPKIN: My recollection of that is that the  
4 documents were raised, and we pointed out to the transcript  
5 from May, and nothing was addressed further than that.

6 All we're suggesting is we're not saying the documents  
7 won't eventually make their way to plaintiffs, because  
8 frankly, if they're responsive and it eliminates MI's need for  
9 further expense, it would not be an issue. But we should have  
10 an opportunity to review what other counsel in a different  
11 State Court case agreed to.

12 THE COURT: Wait a minute. Wait a minute. Other  
13 counsel representing your client agrees to something; isn't  
14 your client bound by that?

15 MS. LUMPKIN: Your Honor, yes --

16 THE COURT: Mr. Cobb was your client's agent.

17 MS. LUMPKIN: I recognize that may be the case. The  
18 reality is --

19 THE COURT: What do you mean it may be the case? It  
20 is the case, right?

21 MS. LUMPKIN: But, Your Honor, Mr. Lucey entered into  
22 an agreement in that case with our client's counsel.

23 THE COURT: It hasn't gone anywhere, and --

24 MS. LUMPKIN: That's why we'd like the opportunity to  
25 review with what that agreement is, and then at least have an

1 opportunity to know what was produced to Mr. Lucey.

2 MR. BRYSON: Don't you know what was produced?

3 MS. LUMPKIN: No, I don't.

4 MR. BRYSON: Did you ask Mr. Ouzts?

5 MS. LUMPKIN: Mr. Ouzts just said he wasn't  
6 involved --

7 THE COURT: You don't need to -- You know. It seems  
8 like that we're starting to pick at nits, which I understand  
9 is important, but if your client, represented by a good lawyer  
10 in Mr. Ouzts' firm, agreed to give documents to Mr. Lucey,  
11 then you don't get another shot at that. You can't say, oops,  
12 we made a mistake, on behalf of the same client.

13 MS. LUMPKIN: I understand, Your Honor, but obviously  
14 counsel for MI in that case anticipated a need to enter into  
15 an agreement with Mr. Lucey requesting that they return the  
16 documents. I don't know why they did that, but there must  
17 have been a need either from the client's perspective or  
18 counsel's perspective. Let's get Mr. Cobb to come down here  
19 and talk to us about it at the next status conference.

20 THE COURT: Okay. Bring him here tomorrow. Or talk  
21 to him at least by tomorrow, all right? Okay.

22 Anything else? Thanks a lot.

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24 (Court adjourned at 3:10 p.m.)  
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REPORTER'S CERTIFICATION

I, Debra L. Potocki, RMR, RDR, CRR, Official Court Reporter for the United States District Court for the District of South Carolina, hereby certify that the foregoing is a true and correct transcript of the stenographically recorded above proceedings.

S/Debra L. Potocki  
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Debra L. Potocki, RMR, RDR, CRR